United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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75-1150

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For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

STUART STEINBERG,

Defendant-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

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Statement

Appellant Stuart Steinberg moves, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure for a rehearing and reconsideration of this Court's order and opinion dated November 10, 1975 (*United States* v. *Steinberg*, slip op. 6433), affirming the judgment of conviction entered against him on April 8, 1975, in the United States District Court for the Southern District of New York. Additionally, Steinberg suggests, pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, that the rehearing be held *in banc*.

The wiretap issue presented in this case is of extraordinary and nationwide significance. Other federal courts including the Ninth Circuit have spoken on the issue in a manner contrary to this Court. The importance of this issue and the conflict between the circuits merits reconsideration by this Court.

ARGUMENT

POINT I

Recent Third and Ninth Circuit authority, as well as other recent federal authority overlooked by this Court, persuasively demonstrate that the government's wiretap application failed to contain the required factual showing that normal investigative procedures had been tried and failed or were unlikely to succeed.

This Court observed that the Steinberg wiretap application "provide[d] little factual basis for concluding that normal investigative techniques had not 'suffice[d] to expose the crime' " (*United States* v. *Steinberg, supra,* slip op. 6433, at 6437-38) and warned the government that "in the future" it should "include a more detailed factual statement indicating the inadequacy of other investigative techniques * * *" (*id.,* slip op. 6433, at 6438). What this Court relied on to justify its finding that the requisite factual showing had been made in the instant case were two circumstances: the description in the application of pre-wiretap drug transactions between Steinberg and government agents and Steinberg's use of the telephone in "initiat[ing] and arrang[ing]" these transactions and in "contact[ing] his suppliers." (*Id.,* slip op. 6433, at 6436.)

Neither of these circumstances has any conceivable relevance to the efficacy of alternative means of investigation which were either used or ever contemplated. Previous drug transactions may show probable cause, but no more. Indeed, if anything, the detailing of these transactions and the openness with which they were conducted negate the need for wiretaps. As to the desire to determine the scope of Steinberg's operations and the source of his supply, while a legitimate aim for a wiretap investigation, the goal of an investigation may not itself serve as justification for the means. The statute is necessarily rendered impotent unless a showing is made as to how or why other means of investigation would not suffice to accomplish the ends sought.

Recent circuit and district court authority defining the factual showing required to satisfy the statute (18 U.S.C. §2518[1][c]), and indeed, in one instance holding inadequate a factual showing greater than was made in the case at bar, were overlooked by this Court.

In *United States* v. *Kalustian*, —— F. 2d ——, Docket No. 74-3314 (9th Cir. Aug. 4, 1975),* the Ninth Circuit suppressed wiretap evidence because the government's wiretap "application did not adequately show why traditional investigative techniques were not sufficient in [that] particular case" (*id.*, op. at 5). The government's application for the Kalustian wiretap contained far more "data" from which an authorizing judge could determine for himself the likelihood for success of non-wiretap means of investigation than did the Steinberg application. Spe-

* The government's petition for a Ninth Circuit rehearing *in banc*, filed on October 16, 1975, is pending.

cifically, the Kalustian application alleged that government informants were unwilling to "testify to information they * * * provided" (*id.*, op. at 2) and that there was a low "probability of success in securing presentable evidence" through "such investigative techniques as physical surveillance and the records obtainable" (*id.*, op. at 2).

But the Ninth Circuit found even these assertions insufficient to comply with the directive of 18 U.S.C. §2518 (1)(c) because they failed to "enlighten [the court] as to why this * * * case presented any investigative problems which were distinguishable in nature or degree from any other * * * case" (*id.*, op. at 5). That Court held in order to satisfy the requirement of 18 U.S.C. §2518(1)(c):

> "The Government must (1) inform [the authorizing judge] of every technique which is customarily used in * * * investigating the type of crime involved, and (2) explain why each of them * * * is * * * unlikely to succeed because of the particular circumstances of that case." (*Id.*, op. at 6.)

The factors relied upon by this Court in upholding the Steinberg wiretap—Steinberg's drug transactions with the government agent and his use of the telephone in connection with those transactions—disclosed no information regarding traditional investigative techniques and had no bearing whatever on why alternative techniques were unlikely to succeed.

The court in *United States* v. *Curreri*, 388 F. Supp. 607 (D. Md. 1974), suppressed wiretap evidence because the government's application contained no factual support to enable the issuing judge to find that other means of in-

vestigation appeared futile. That court wrote as follows (*id.*, 388 F. Supp., at 620):

> "While there may [be] eminently sound reasons why these investigative techniques were not considered likely to succeed, if tried, *those reasons were not made known to* [*the issuing judge*] *in the application* * * *." (Emphasis added.)

Other recent federal court decisions upholding wiretap applications by comparison establish the patent insufficiency of the Steinberg application. In *United States* v. *Armocida*, 515 F. 2d 29 (3d Cir. 1975), the Third Circuit held a wiretap application sufficient because it revealed a history of unsuccessful use of physical surveillance, undercover agents, and an informant unwilling to testify. Similar findings were made in *United States* v. *Kerrigan*, 514 F. 2d 35 (9th Cir. 1975), *cert. denied*, —— U.S. ——, 44 U.S.L.W. 3258 (Nov. 4, 1975). There, the wiretap application detailed the failure of the government's three-month investigation, including a physical surveillance which established a tight security scheme utilized by the suspects, and the use of informants who were unwilling to testify even if granted immunity.* And in *United States* v. *Baynes*, 400 F. Supp. 285 (E.D. Pa. 1975), the court upheld a challenged wiretap application which alleged that informants and other witnesses had no knowledge of the extent of the suspect's activities, physical surveillance on the suspect's premises

* In *United States* v. *Kerrigan, supra*, the Court warned the government that use of "the boilerplate recitation of the difficulties of gathering usable evidence * * * is not a sufficient basis for granting a wiretap order." (*Id.*, 514 F. 2d, at 38.) See also *United States* v. *Smith*, 519 F. 2d 516 (9th Cir. 1975), where the Court reaffirmed that "[i]t was the Congressional intent to restrict wire taps to those that were not only reasonable but necessary." (*Id.*, 519 F. 2d, at 518.)

would be detected and jeopardize the investigation, and infiltration by government agents was not possible.

Unlike *Armocida*, *Kerrigan*, and *Baynes*, the government in *Steinberg* did not and could not truthfully assert that normal investigative means were not apt to succeed. Concededly, Steinberg operated in an open and notorious manner; knowledgeable informants, trusted by Steinberg, were available and apparently ready and willing to testify; surveillance, if conducted, was not reported to the issuing court, and no reason was ever given as to why surveillance would not work. Even the use of a pen register (for which Title III authorization is not needed) which would have disclosed to whom Steinberg made his calls, was not tried nor was any reason for not using this device ever given.

To be sure, wiretap applications must be viewed "as a whole and 'in a practical and commonsense fashion' " (*United States* v. *Steinberg*, *supra*, slip op. 6433, at 6438). But the precise statutory requirement for a factual showing of need for this "extraordinary investigative device" as predicate to wiretap authorization must be strictly adhered to (*United States* v. *Giordano*, 416 U.S. 505, 515-16, 521 [1974]). As the Ninth Circuit noted in *Kalustian*, *supra*, without such a factual presentation there is nothing "from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative." (*Id.*, op. at 6-7.)

POINT II

The Court overlooked record fact and failed to apply its own prior case holdings in ruling that Steinberg was not entitled to a jury instruction on his defense of drug intoxication and that the trial court's confusion of Steinberg's defense with Kaye's insanity defense did not require reversal.

Steinberg argued on his appeal that the trial court committed reversible error by confusing his drug intoxication defense with Kaye's insanity defense. This Court agreed that the trial court "erred" but held that "[t]he error does not require reversal" because Steinberg "was [not] entitled to his requested charge [on the defense of drug intoxication] at all" (*United States* v. *Steinberg, supra,* slip op. 6433, at 6442).

We submit that Second Circuit law both required the jury to be instructed on Steinberg's drug intoxication defense and mandates a reversal of Steinberg's conviction.

This Court has firmly ruled that a defendant is entitled to jury instructions on a defense theory for which there is any factual support in the record, however slight or even incredible that evidence may be. *United States* v. *Platt,* 435 F. 2d 789, 792 (2d Cir. 1970); *United States* v. *O'Connor,* 237 F. 2d 466, 474, n. 8 (2d Cir. 1956). The rule was stated in *United States* v. *O'Connor, supra,* as follows (*id.*):

> "A criminal defendant is entitled to have instructions presented *relating to any theory of defense* for which there is any foundation in the evidence, *no matter how weak or incredible that evidence may be.*" (Emphasis supplied.)

And in determining whether "there is any foundation in the evidence" to justify an instruction on a defense theory, the evidence must be viewed in the light most favorable to the defendant. *United States* v. *Licursi*, —— F. 2d ——, slip op. 6449, 6457 (2d Cir. Nov. 11, 1975); *United States* v. *Anglada*, —— F. 2d ——, slip op. 217, 221 (2d Cir. Oct. 16, 1975); *United States* v. *Cohen*, 431 F. 2d 830, 832 (2d Cir. 1970); *United States* v. *Dehar*, 388 F. 2d 430, 433 (2d Cir. 1968).

In the instant case this Court ruled that Steinberg was not entitled to a jury charge on his defense theory of drug intoxication because there was no testimony "as to specific instances of [Steinberg's] drug intoxication * * *, [and t]here was no proof of drug intoxication at times which were relevant to the crimes" (*United States* v. *Steinberg, supra*, slip op. 6433, at 6442).

However, the unrebutted evidence viewed in the light most favorable to Steinberg is that during the summer of 1973—the "times which were relevant to the crimes"—Steinberg was "*always* taking crystal"* "three or four or five times a day" together with other substances (tr. 572-73) (emphasis supplied). There was further uncontradicted proof from an expert witness, Dr. Solomon Snyder, that such doses of "PCP" over such an extended period of time results in an impaired "ability to function mentally" (tr. 602, 610-611).

Thus, there was ample evidence in the record from which a properly instructed jury could have inferred that

* The term "crystal" refers to the substance phencyclidine hydrochloride ("PCP") (see, *e.g.*, tr. 573).

Steinberg was drug intoxicated with a seriously diminished mental capacity at the times relevant to the crimes charged and incapable of forming the specific intent required for conviction of those crimes. He was thus entitled to a jury charge on his defense theory of drug intoxication. *Compare United States* v. *Clark*, 498 F. 2d 535, 537 (2d Cir. 1974), in which this Court affirmed the refusal to charge the jury on the defense of drug intoxication because "there was no evidence at all that appellant was acting under the influence of drugs * * *."

Having adduced sufficient evidence to warrant a jury charge on his defense theory, Steinberg was seriously prejudiced by the trial judge's inclusion of him in an insanity instruction applicable only to Kaye. The trial court's confusion of the two defenses may very well have resulted in the jury's rejection of Steinberg's intoxication defense on the improper basis that they found him sane.*

As this Court acknowledged, the trial court in confusing Steinberg's defense with that of Kaye "erred" (slip op. at 6441). It follows that the erroneous and prejudicial charge linking Steinberg to Kaye's insanity defense constitutes reversible error and requires a new trial.

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* Indeed, it would have been easy for the jury to reject an insanity defense for Steinberg. No treating psychiatrist testified in his behalf, and no argument was made that he was legally insane.

Conclusion

Steinberg's petition for a rehearing and a rehearing *in banc* should be granted; the judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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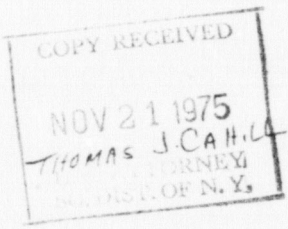
November 24, 1975

Service of 2 copies of the within Petition is hereby admitted this 21st day of Nov. 1975

Signed _____

Attorney for Appellee



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